Vadiveloo v Thanaletchumy & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO 17–32 OF 1990
EUSOFF CHIN, SHANKAR AND FAIZA TAMBY CHIK JJ
4 MAY 1991

Legal Profession *— Disciplinary proceedings — Disciplinary committee — Disciplinary committee had dismissed complaint against advocate and solicitor — Whether disciplinary committee became functus officio after dismissing complaint*

Legal Profession *— Disciplinary proceedings — First disciplinary committee had dismissed complaint against advocate and solicitor — No appeal against first disciplinary committee's order — Whether Bar Council could act on same complaint and apply to appoint second disciplinary committee — Whether second disciplinary committee could hear same complaint — Legal Profession Act 1976 ss 101(3), (4) & 102(1)*

The appellant, an advocate and solicitor, acted for the respondent in respect of the purchase of a piece of property. The respondent made three payments to the appellant and alleged that the appellant was to prepare a sale and purchase agreement after such payments were made. The appellant denied this allegation. A sale and purchase agreement was not executed and the respondent subsequently did not wish to proceed with the purchase of the property. The respondent did not receive a refund of her money from the appellant despite having seen the appellant on several occasions. The respondent then made a complaint to the Bar Council. A disciplinary committee was appointed and a hearing of the respondent's complaint was fixed. The hearing was, however, adjourned because the respondent's solicitors had just been retained. At the adjourned hearing before the disciplinary committee held on 4 August 1988, the appellant was present but the respondent was absent. The appellant applied to have the complaint dismissed on the ground, inter alia, that the matter had been long outstanding and it was unjust to the appellant to have the matter hanging over him for such a long time. The disciplinary committee agreed with the appellant and thus dismissed the complaint. However, when the members of the committee were on their way out of the building where the hearing was held, they saw the respondent and asked her why she was not present at the hearing as fixed. The respondent admitted receiving the notice of the hearing and was advised to file a fresh complaint if she wished to pursue the matter further. The order of the disciplinary committee dismissing the respondent's complaint was filed with the Bar Council and the Registrar of the High Court pursuant to s 101(3) of the Legal Profession Act 1976 and copies of the order were served, inter alia, on the appellant and the respondent. The respondent did not appeal against the said order and also did not file a fresh complaint against the appellant. The Bar Council, however, acted on the respondent's original complaint and applied to the Chief Justice of Malaya to

appoint a new disciplinary committee to rehear the same complaint. The second disciplinary committee found the appellant's conduct unbecoming and unbefitting of an advocate and solicitor and ordered the appellant to be suspended from practice for six months and to pay costs of $2,000. The appellant appealed to the High Court against the findings and order of the second disciplinary committee.

Held, allowing the appeal:

(1) Once the first disciplinary committee had dismissed the respondent's complaint, it became functus officio and its advice to the respondent to file a fresh complaint could not be treated as part of the order made.

(2) The first disciplinary committee's order had already disposed of the respondent's complaint. The Bar Council therefore could not act on the same complaint and apply for a second disciplinary committee to be appointed to rehear the matter. Consequently the second disciplinary committee had no jurisdiction to adjudicate and determine the complaint as its appointment was based on an invalid application by the Bar Council.

Per curiam: The correct advice in the circumstances of this case is for the complainant to lodge an appeal under s 102(1) of the Act.

[Bahasa Malaysia summary

Perayu, seorang peguambela dan peguamcara, bertindak untuk penentang berkenaan dengan pembelian sekeping harta. Penentang telah membuat tiga pembayaran kepada perayu dan mengatakan bahawa perayu dikehendaki menyediakan suatu perjanjian penjualan dan pembelian selepas pembayaran tersebut dibuat. Perayu menafikan pengataan ini. Perjanjian penjualan dan pembelian tidak disempurnakan dan penentang berikutnya tidak ingin meneruskan pembelian harta itu. Penentang tidak menerima pembayaran kembali wangnya daripada perayu walaupun beliau telah berjumpa dengan perayu beberapa kali. Penentang kemudiannya membuat suatu aduan kepada Majlis Peguam. Satu jawatankuasa tatatertib telah dilantik dan pembicaraan aduan penentang ditetapkan. Pembicaraan itu, akan tetapi, ditangguhkan kerana penentang baru sahaja mendapat perkhidmatan peguamcara. Pada pembicaraan di hadapan jawatankuasa tatatertib yang diadakan pada 4 Ogos 1988, perayu hadir tetapi penentang tidak hadir. Perayu memohon untuk aduan itu dibuang atas alasan, antara lainnya, bahawa perkara tersebut telah lama belum diputuskan dan adalah tidak adil kepada beliau untuk perkara itu bergantung diatasnya bagi masa yang begitu lama. Jawatankuasa tatatertib bersetuju dengan perayu dan oleh kerana itu membuang aduan itu. Walaupun demikian, ketika ahli jawatankuasa itu sedang dalam perjalanan keluar daripada bangunan di mana pembicaraan itu telah diadakan, mereka berjumpa dengan penentang dan menyoal beliau mengapa beliau tidak hadir pada pembicaraan itu seperti yang ditetapkan. Penentang mengakui

menerima notis pembicaraan itu dan telah dinasihatkan untuk memfailkan aduan yang baru jika beliau ingin menuntut perkara itu selanjutnya. Perintah jawatankuasa tatatertib membuang aduan penentang telah difailkan dengan Majlis Peguam dan Pendaftar Mahkamah Tinggi mengikuti s 101(3) Akta Profesyen Undang-Undang 1976 dan salinan perintah itu telah disampaikan, antara lainnya, ke atas perayu dan penentang. Penentang tidak merayu terhadap perintah tersebut dan juga tidak memfailkan suatu aduan baru terhadap perayu. Majlis Peguam, akan tetapi, bertindak atas aduan asal penentang dan memohon kepdada Hakim Besar Malays untuk melantik satu jawatankuasa tatatertib yang baru untuk membicarakan semula aduan yang sama. Jawatankuasa tatatertib yang kedua mendapati kelakuan perayu tidak patut dilakukan dan tidak wajar bagi seorang peguambela dan peguamcara dan memerintah perayu digantung daripada pekerjaannya selama enam bulan dan membayar $2,000 sebagai kos. Perayu merayu kepada Mahkamah Tinggi terhadap pendapat dan perintah jawatankuasa tatatertib kedua.

Diputuskan, membenarkan rayuan itu:

(1) Sebaik sahaja jawatankuasa tatatertib telah membuang aduan penentang, ia menjadi functus officio dan nasihatnya kepada penentang untuk memfailkan suatu aduan baru tidak boleh dianggap sebagai sebahagian daripada perintah yang telah dibuat.

(2) Perintah jawatankuasa tatatertib pertama telah membuang aduan penenetang. Oleh kerana itu Majlis Peguam tidak boleh bertindak atas aduan yang sama dan memohon perlantikan jawatankuasa tatatertib kedua untuk membicarakan semula perkara itu. Oleh kerana itu jawatankuasa tatatertib kedua tidak mempunyai bidang kuasa untuk mengadili dan memutuskan aduan itu oleh sebab perlantikannya berasaskan satu permohonan yang tidak sah oleh Majlis Pejuam.

Per curiam: Nasihat yang betul dalam keadaan kes ini adalah bagi pengadu untuk membuat suatu rayuan di bawah s 102(1) Akta itu.]

Legislation referred to

Legal Profession Act 1976 ss 99, 101(3), (4), 102(1)

Jogindar Singh, RC Nathan and *V Vijendran (Jogindar Singh & Co)* for the appellant.

Karpal Singh (Karpal Singh & Co) for the respondent.

BK Sethu, S Radhakrishnan and *Maidzuara Mohammed (Shearn Delamore & Co)* for the Malaysian Bar.

Faiza Tamby Chik J (delivering the grounds of judgment of the court): This is an appeal by way of an originating motion by an advocate and solicitor (hereinafter referred to as 'the appellant') against the findings and order of the disciplinary committee comprising Mr Tara Kumar Sen (chair-

man), Mr K Sothinathan and Mr Yeoh Poh San (hereinafter referred to as 'DC No 2') appointed on 26 September 1988 and constituted under s 99 of the Legal Profession Act 1976 ('the Act') made on 22 August 1990, whereby it was ordered that the appellant be suspended from practice as an advocate and solicitor in the States of Malaya for a period of six months and pay costs of $2,000 to the complainant/respondent Thanaletchumy a/p Veloo. The allegations made against the appellant before the committee and which the committee found to be substantiated were that he had acted as a solicitor for the respondent and that his conduct was unbecoming and unbefitting that of an advocate and solicitor and that he had committed a breach of his professional duty.

The following facts are elicited from the decision of the disciplinary committee:

(i) The complainant wanted to buy a piece of property in 1984 and went through one TP Chellian and was introduced to a piece of property known as Lot 86, Taman Dato' Hormat, Sg Way, Selangor (hereinafter referred to as 'the said property').

(ii) The said property was registered in the name of one Kothandabuni s/o Ramasamy (hereinafter referred to as 'the vendor').

(iii) When the complainant wanted to buy the said property, Chellian told her that she would have to go to see Mr G Vadiveloo, ie the appellant, and that Mr G Vadiveloo was the lawyer in charge and would handle everything.

(iv) Three payments were made by the complainant on three occasions at the office of Mr G Vadiveloo:

  (a) a sum of $2,000 paid on 16 May 1984 in cash for which a temporary receipt in the name of Vadiveloo & Co was issued; the sum of $2,000 was also subsequently banked into the client's account of Mr G Vadiveloo;

  (b) a sum of $18,000 ($8,500 cash and $9,500 bank draft) was paid on 5 June 1984; a receipt was issued by the vendor which receipt was prepared by Mr G Vadiveloo's clerk, one Soosay Mary d/o Anthonysamy. The bank draft for $9,500 was banked into Mr G Vadiveloo's client's account;

  (c) a sum of $10,000 was paid on 12 November 1984 and the vendor signed a receipt again prepared by the abovenamed Soosay Mary.

(v) The complainant says that after paying $30,000, Mr G Vadiveloo was to prepare a sale and purchase agreement; this Mr G Vadiveloo denies.

(vi) A sale and purchase agreement was not executed and subsequently the complainant did not wish to purchase the said property.

(vii) The vendor said that he was prepared to refund the complainant's money only if he could sell the said property.

(viii) The complainant went to see Mr G Vadiveloo on several occasions but when she did not receive any refund of her money, she resorted to legal recourse including complaining to the Bar Council.

Prior to this, another disciplinary committee comprising Mr Ooi Boon Leong (chairman), Cik Hendon bte Hj Mohd and Datin Saraswathy Devi was appointed by the Chief Justice in December 1987 (hereinafter referred to as 'DC No 1') to hear the same complaint by the same complainant/respondent. Before DC No 1 at a hearing held on 4 August 1988, the appellant was present but the complainant/respondent was absent. There the appellant submitted that the complaint should be dismissed on the grounds that the matter had been long outstanding since before March 1987 and that a hearing previously fixed had been adjourned because solicitors for the complainant had just been retained and had now been discharged and that it would be unjust to the appellant to have the matter hanging over him for such a long time. All the members of the committee agreed with the submission of the appellant and dismissed the complaint. The last paragraph of the order of DC No 1 dated 22 August 1988 reads:

> When the members of the committee were on their way out of the building they saw the complainant and others. The committee members asked the complainant to give a statement why she was not at the hearing at the time fixed. The complainant admitted receiving (and produced) the notice dated 26 July 1988 giving notice of the hearing and the venue. She was advised to file a fresh complaint if she wished to pursue this matter further.

This order was dated 22 August 1988.

It is not disputed that the order dated 22 August 1988 was filed with the Bar Council and the Registrar of the High Court pursuant to s 101(3) of the Act and copies of the order were served by the Bar Council on the chairman and the secretary of the Selangor and Federal Bar Committee, the complainant and the appellant pursuant to s 101(4) of the Act on 6 September 1988. Section 101(3) of the Act states:

> Every order of the Disciplinary Committee shall be filed with the Bar Council and with the Registrar within three months of the date the Disciplinary Committee is appointed or within such longer period as the Chief Justice on the application of the Disciplinary Committee may in writing specify and every such order shall be acted upon by the Malaysian Bar and the Registrar and be enforceable in like manner as a judgment or order of the High Court.

And it is plain from the facts of the case that this order of 22 August 1988 which 'shall be enforceable in like manner as a judgment or order of the High Court' had not been set aside or reversed. That order complies with s 101(4) of the Act which states:

> A copy of the order of the Disciplinary Committee shall forthwith be served by the Bar Council upon the advocate and solicitor in question and upon the person by whom the complaint was made or information referred and where the address of the advocate and solicitor or of the person to be served is unknown, publication in the national English and Malay language newspapers of the effect of the order shall be deemed to be good and sufficient notice of the copy of the order.

Therefore I am of the opinion that the order dated 22 August 1988 is for that reason still subsisting. With reference to the last paragraph of that order which I had adverted to earlier on, especially the words 'she was

advised to file a fresh complaint if she wished to pursue this matter further' remained an advice albeit a wrong one for having made the order dismissing the complaint for want of prosecution, the DC No 1 became functus officio and whatever was said after dismissing the complaint could not by any stretch of the imagination be treated as part of that order.

The correct advice in the circumstances of this case is for the complainant to lodge an appeal under s 102(1) of the Act which states: 'An appeal against any decision made by the Disciplinary Committee on the application or complaint under this Act shall lie to the High Court at the instance either of the applicant or the advocate and solicitor against whom the complaint is made.' There was no such appeal lodged against the dismissal of the complaint by the DC No 1. Neither was there evidence or record to show that the complainant had filed another complaint or a fresh one under s 95 of the Act. The appellant's counsel said there was indeed no fresh complaint lodged by the complainant.

From the evidence on record, it is plain that the Bar Council had acted on the same complaint as that which had been dismissed by DC No 1 whose decision had been filed under s 101(3) of the Act with the Bar Council and the registrar, and served on all the relevant parties as provided for under s 101(4) of the Act. There was no appeal against the order made by the DC No 1 as provided for under s 102 of the Act and hence the complaint was disposed of. When the Bar Council acted on the same complaint in making its application to the learned Chief Justice to appoint a new disciplinary committee (DC No 2) to rehear that same complaint it had then not acted according to law. The application is invalid. As a result, DC No 2 has no jurisdiction to adjudicate and determine the complaint as its appointment is based on an invalid application.

I allow the appeal. There shall be no order as to costs.

Appeal allowed.

Reported by Wong Kian Kheong